Tridant Engineering (M) Sdn Bhd v Ssangyong Engineering and Construction Co Ltd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(C)(A)-1548–09 OF 2015
DAVID WONG, UMI KALTHUM AND HASNAH HASHIM JJCA
4 AUGUST 2016

Arbitration — Award — Setting aside — Subcontract — Demand for sums owing arising from works done — Whether main contractor liable to pay subcontractor — Whether claim time barred — Application at High Court to set aside arbitral award — Whether High Court correct in findings

The respondent was appointed as the main contractor by Yetcome Investments Ltd ('the employer') to construct a superstructure ('the project'). The appellant was the nominated subcontractor appointed by the employer to carry out electrical services installation and extra-low voltage installation works for the project. The respondent entered into two subcontracts with the appellant for the aforesaid nominated works. Dispute between the appellant and respondent arose as to what was owed for works done by the appellant who demanded for an amount of RM3,070,019.74 ('the sum'). The respondent denied the demands, causing the appellant to issue a notice of arbitration. According to the respondent, it was not liable to pay the appellant; and the claim was time-barred. In reply, the appellant submitted said that reasonable time for the employer to pay had lapsed hence the respondent was liable to pay; and time had only started to run from the date reasonable steps had been taken by the respondent to be paid by the employer. At the end of the arbitral proceedings, the arbitrator found that the respondent was not entitled to withhold payment; and although the appellant's claims were time-barred under s 6 of the Limitation Act 1953 ('the Act') as time expired pursuant to a valid acknowledgement in the form of a proof of debt filed by respondent to a third party in respect of a debt owed by the employer to respondent. In the High Court, the respondent's application was to set aside the arbitral award pursuant to ss 37 and 42 of the Arbitration Act 2005. The application was sustained by the High Court. Hence, the present appeal. The issues that arose were whether the learned judge was correct in finding that the arbitrator had decided on a matter (postponement of the limitation period of the debt claimed) outside his term of reference resulting in an exercise in excess of his jurisdiction; and whether the learned judge was correct in finding that the arbitrator had erred in finding that the proof of debt lodged by the respondent had postponed the limitation period of the debt claimed pursuant to ss 26 and 27 of the Act.

Held, allowing the appeal with costs of RM50,000:

(1) Arbitral proceeding is not a court proceeding where there is in existence a specific legal procedural regime regulating its process. Arbitration is an alternative dispute resolution module where disputes are resolved by legally as well non-legally trained adjudicators. Hence arbitration is conducted with greater flexibility and freedom from the rigid procedures of litigation in the judicial system. It is trite that the Evidence Act 1950 is not applicable to arbitral proceeding and rightly so (see para 29).

(2) The appellant's failure to plead ss 26 and 27 of the Act was not fatal to its claim as the respondent was given every opportunity to submit on that issue. There was also no evidence to say that the respondent had suffered a disadvantage or deprived of an opportunity to ventilate that issue. Even though ss 26 and 27 of the Act were not formally pleaded, the pleadings as they stood were adequate to put the respondent on notice the issue of postponement of the limitation period (see paras 31–32).

(3) The learned arbitrator was faced with two interpretations of law and fact which were not perverse. It must not be forgotten that the arbitration was convened for the simple reason to resolve the competing interpretations by their chosen arbitrator. That being the case, it would be farcical for the court to intervene when in the first place the parties had agreed to abide by the referee's decision. The modern approach of the courts towards arbitral award dictates that unless the award is clearly and obviously tainted with some sort of illegality such that it would not be conscionable for the courts to allow the same to stand, there will not be any intervention. This approach is nothing more and nothing less than giving effect to the very bargain which the parties had agreed to (see paras 41 & 43).

(4) When parties resort to arbitration to resolve a dispute, they are in fact choosing an expert in the area of dispute to give a final and binding 'referee's decision'. To allow the losing party to now question the expert's findings would destroy the very foundation of an arbitration agreement. Further, the courts do not sit in an appellate function when hearing references from arbitral proceeding. Their function is only one of very limited supervisory nature (see para 43).

(5) The manner in which the question of law was framed was nothing more than a mixed question of law and fact 'dressed up' in a question of law. It is trite that the court has no jurisdiction to a mixed question of fact and law. The question of law as framed by the respondent before the learned judge was flawed and should not have been allowed by the learned judge. That being the case, it was unnecessary to answer the question as whether the arbitrator's interpretation of the law and fact was correct in law (see paras 42 & 44).

[Bahasa Malaysia summary

Responden telah dilantik sebagai kontraktor utama oleh Yetcome Investments Ltd ('majikan') untuk membina satu struktur ('projek'). Perayu adalah calon subkontraktor yang dilantik oleh majikan untuk menjalankan pemasangan perkhidmatan elektrik dan kerja pemasangan voltan lebih rendah untuk projek tersebut. Responden telah memasuki dua subkontrak dengan perayu untuk kerja yang dicalonkan tersebut. Pertikaian antara perayu dan responden timbul berhubung apa yang terhutang untuk kerja yang dilakukan oleh perayu yang menuntut jumlah RM3,070,019.74 ('jumlah'). Responden menafikan tuntutan itu, menyebabkan perayu mengeluarkan notis timbang tara. Menurut responden, ia tidak bertanggungjawab untuk membayar perayu; dan tuntutan itu telah luput had masa. Sebagai jawapan, perayu telah berhujah mengatakan bahawa masa yang munasabah untuk majikan membayar telah luput justeru responden bertanggungjawab untuk membayar; dan masa hanya bermula dari tarikh langkah-langkah munasabah diambil oleh responden untuk dibayar oleh majikan. Di akhir prosiding timbang tara, penimbangtara mendapati bahawa responden tidak berhak untuk menahan bayaran; dan meskipun tuntutan perayu telah luput had masa di bawah s 6 Akta Hada Masa 1953 ('Akta') oleh kerana masa telah luput menurut pengesahan sah dalam bentuk bukti keberhutangan yang difailkan oleh responden kepada pihak ketiga berkaitan hutang yang perlu dibayar oleh majikan kepada responden. Dalam Mahkamah Tinggi, permohonan responden adalah untuk mengetepikan award timbang tara menurut ss 37 dan 42 Akta Timbangtara 2005. Permohonan it dikekalkan oleh Mahkamah Tinggi. Justeru, rayuan ini. Isu-isu yang timbul adalah sama ada hakim yang bijaksana adalah betul dalam mendapati bahawa timbang tara telah memutuskan berhubung satu perkara (penangguhan tempoh had masa hutang yang dituntut) di luar terma rujukannya menyebabkan pelaksanaan yang melampaui bidang kuasanya; dan sama ada hakim yang bijaksana adalah betul dalam mendapati bahawa timbang tara telah terkhilaf dalam mendapati bahawa bukti hutang yang dibuat oleh responden telah menangguhkan tempoh had masa hutang yang dituntut itu menurut ss 26 dan 7 Akta.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM50,000:

(1) Prosiding timbang tara bukan prosiding mahkamah di mana terdapat rejim prosedur perundangan spesifik mengawalselia prosesnya. Timbang tara adalah satu modul penyelesaian pertikaian alternatif di mana pertikaian diselesaikan oleh hakim-hakim terlatih dari segi undang-undang dan juga bukan undang-undang. Justeru timbang tara dijalankan dengan lebih fleksibiliti dan kebebasan daripada prosedur ketat litigasi dalam sistem kehakiman. Ia adalah lapuk bahawa Akta Keterangan 1950 tidak terpakai kepada prosiding timbang tara (lihat perenggan 29).

(2) Kegagalan perayu untuk mempli ss 26 dan 27 Akta tidak mudarat kepada tuntutannya kerana responden telah diberikan setiap peluang untuk mengemukakan isu tersebut. Juga tiada keterangan untuk mengatakan bahawa responden telah mengalami kelemahan atau terkilan peluang untuk mengemukakan isu tersebut. Walaupun ss 26 dan 27 Akta tidak diplikan secara formal, pliding sepertimana ia kekal adalah mencukupi untuk memberi notis kepada responden isu penangguhan tempoh had masa (lihat perenggan 31–32).

(3) Penimbang tara yang bijaksana berdepan dengan dua penafsiran undang-undang dan fakta yang tidak bercanggah. Tidak dilupakan bahawa timbang tara telah diadakan untuk sebab mudah untuk menyelesaikan penafsiran yang bersaing itu oleh penimbang tara yang telah dipilih oleh mereka. Jika begitu, ia melucukan untuk mahkamah campur tangan apabila pada mulanya pihak-pihak telah bersetuju untuk mematuhi keputusan pengadil. Pendekatan moden mahkamah terhadap award timbang tara menunjukkan bahawa kecuali jika award itu jelas dan nyata tercemar dengan suatu yang menyalahi undang-undang sehingga ia tidak berat sebelah untuk mahkamah membenarkan pendirian yang sama, tidak ada apa-apa campur tangan. Pendirian ini tidak lebih dan tidak kurang daripada memberi kesan kepada tawaran yang mana pihak-pihak telah bersetuju (lihat perenggan 41 & 43).

(4) Apabila pihak-pihak mengambil jalan keluar kepada timbang tara untuk menyelesaikan pertikaian, mereka pada hakikatnya memilih seorang pakar dalam bidang berhubung pertikaian untuk memberi 'referee's decision' yang muktamad dan mengikat. Untuk membenarkan pihak yang kalah untuk kini mempersoalkan penemuan pakar akan memusnahkan asas perjanjian timbang tara. Selanjutnya, mahkamah tidak berada dalam fungsi rayuan apabila perbicaraan rujukan daripada prosiding timbang tara. Fungsi mereka hanya suatu yang bersifat kawal selia yang terhad (lihat perenggan 43).

(5) Cara yang mana persoalan undang-undang telah dibuat tidak lebih daripada persoalan campuran berhubung undang-undang dan fakta yang 'dressed up' dalam suatu persoalan undang-undang. Ia adalah nyata bahawa mahkamah tidak mempunyai bidang kuasa ke atas persoalan campuran fakta dan undang-undang. Persoalan undang-undang sepertimana dibuat oleh responden di hadapan hakim perbicaraan telah cacat dan tidak patut dibenarkan oleh hakim yang bijaksana. Jika begitu kesnya, ia tidak perlu untuk menjawab berhubung sama ada penafsiran undang-undang dan fakta penimbang tara adalah betul dari segi undang-undang (lihat perenggan 42 & 44).]

Notes

For cases on setting aside award, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 1912–1990.

Cases referred to

Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd [2014] 5 MLJ 145; [2014] 7 CLJ 1, FC (refd)

Government of India, The v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441; [2012] 3 CLJ 423, FC (refd)

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd)

Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 6 MLJ 126; [2015] 1 CLJ 617, CA (refd)

Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd [2013] 5 MLJ 98; [2013] 8 CLJ 655, HC (refd)

PT Prima International Development v Kempinski Hotels SA [2012] SGCA 35, CA (refd)

SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd [2014] 2 MLJ 627; [2014] 3 CLJ 632, CA (refd)

Taman Bandar Baru Masai Sdn Bhd v Dindings Corporation Sdn Bhd [2009] MLJU 0793; [2010] 5 CLJ 83, HC (refd)

Tjong Very Sumito and others v Antig Investments Pte Ltd [2009] 4 SLR 732, CA (refd)

Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd [1985] 2 EGLR 14, QBD (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 9, 20, 37, 37(1)(a)(iv), (1)(a)(v), (1)(b)(ii), (2)(b), 42

Evidence Act 1950

Limitation Act 1953 ss 6, 26, 26(2), 27

Appeal from: Originating Summons Nos 24C (ARB)-9–03 of 2015 and 24C (ARB)-24–06 of 2015 (High Court, Kuala Lumpur)

Wong Hin Loong (Gan Chwee Yen with him) (Azman, Davidson & Co) for the appellant.

T Kuhendran (Esther Tan with him) (Zul Rafique & Partners) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court dated 28 August 2015 in which the learned judge allowed an application to set aside a final arbitral award handed down on 21 January 2015 and dismissed an application to recognise and enforce the aforesaid award.

[2] The appellant in this case was the claimant in the arbitration proceeding with the respondent disclaiming the claims.

[3] We heard the appeal and after due consideration to respective submissions of counsel, we allowed the appeal and now give our reasons.

BACKGROUND FACTS

[4] The respondent on 1 March 1996 was appointed as the main contractor by Yetcome Investments Ltd ('the employer') to construct a superstructure for Menara Landmark Johor Bahru in Johor Bahru ('the project'). The appellant was the nominated subcontractor appointed by the employer to carry out electrical services installation and extra low voltage installation works for the project. The respondent on 9 September 1999 entered into two subcontracts with the appellant for the aforesaid nominated works.

[5] Dispute between the appellant and respondent arose as to what was owed for works done by the appellant who via two letters of its solicitors in April 2012 demanded for an amount of RM3,070,019.74 premised on certificates Nos 32 and 33, and 43–45.

[6] In view of the denial by the respondent of the two letters of demand, the appellant in July 2012 issued a notice of arbitration. The appellant in its statement of claim claimed that the respondent had failed to pay the sum of RM3,070,019.74, being its fees for works done. The respondent denied the claim premised on two grounds, first of which was that it had not been paid by the employer, hence not liable to pay the appellant and secondly and in the alternative, the claim was time barred. In reply to the first ground, the appellant said that reasonable time for the employer to pay had lapsed hence the respondent was liable to pay. As for the second ground, time had only started to run from the date reasonable steps had been taken by the respondent to be paid by the employer.

ARBITRATION PROCEEDING

[7] As agreed by the parties, the issues before the arbitral proceeding were as stated in para 63 of the award:

(a) whether the respondent was entitled to deduct RM616,967.20 to account for liquidated and ascertained damages ('LAD') imposed by the employer against the respondent?

(b) whether the appellant had a right to be paid under the electrical and extra-low voltage nominated subcontracts?

(c) whether the limitation period had set in under the progress payment certificates and therefore, the action is time barred?

[8] The learned arbitrator at the end of the arbitral proceeding made the following findings:

(a) in respect of progress payment certificates Nos 32 and 33, Ssangyong ('the respondent') was not entitled to withhold payment whilst in respect of the progress payment certificates Nos 43–45, the 'pay when paid clause' did not prevent Tridant ('the appellant') from claiming on the ground that the respondent's liability to pay appellant was not contingent on respondent's receipt of the sum from the employer — paras 34–61 of the award premised on the Federal Court decision in the case of *Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd* [2014] 5 MLJ 145; [2014] 7 CLJ 1; and

(b) on the issue of limitation, though the appellant's claims were time-barred under s 6 of the Limitation Act 1953 as time expired around mid 2007 or at least around mid 2008, there was a postponement of the limitation period pursuant to s 26(2) of the Limitation Act 1953 to 25 March 2009 by a valid acknowledgement in the form of a proof of debt filed by respondent to a third party in respect of a debt owed by the employer to the respondent. The aforesaid postponement extended the limitation time period to 24 March 2015 and in view of the notice of arbitration was filed by appellant on 20 July 2012, the claim was filed well within the limitation period.

THE HIGH COURT

[9] In the High Court, the respondent's application was to set aside the arbitral award pursuant to ss 37 and 42 of the Arbitration Act 2005.

[10] Under s 37 of the Arbitration Act, the respondent's core ground was that the learned arbitrator decided on a matter not within the terms of reference of the arbitration, hence committed a breach of the principle of natural justice.

[11] As for s 42 of the Arbitration Act, in essence the respondent was saying that the learned arbitrator was wrong in law in his application of the factual matrix to ss 26 and 27 of the Limitation Act 1953.

[12] The respondent's application to set aside the award was sustained by the learned judge. In respect of the s 37 of the Arbitration Act, Her Ladyship in para 45 of her grounds encapsulated her rationale and it reads as follows:

> [45] Such a plea or position as taken by the parties and, by Tridant in particular, is however nowhere near the argument that the limitation period has been postponed or that there is a fresh accrual of action under ss 26 and 27 of the Limitation Act 1953. Such a determination along those lines amounts to determining the dispute on a new difference or that the award contains a decision on a matter which is a new difference see *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617. Hence, the application under s 37 is properly initiated; and the complaints are well-founded. The learned Arbitrator has indeed decided on a matter which was not submitted or was beyond or in excess of the scope of submission to his jurisdiction for determination in which case, the decision is liable to be set aside under s 37.

[13] As for s 42 of the Arbitration Act, the learned judge's reasoning was simply that the issue of acknowledgment of the debt claimed by the appellant was not an issue before the learned arbitrator and hence the learned arbitrator had exceeded his jurisdiction when he decided on the same. Further Her Ladyship held that the proof of debt, which included the appellant's claim of RM3,070,019.74, lodged by the respondent cannot in law amount to an acknowledgment as provided in ss 26 and 27 of the Limitation Act 1953. For clarity and completeness, the relevant parts of her grounds are produced here:

> [72] At the time of the examination of any witness including Ssangyong's witness, the matter of acknowledgment of Tridant's debt from the perspective of ss 26 and 27 of the Limitation Act 1953 was not in issue yet. The matter only arose later, after conclusion of evidence taking and at the time of submissions. Hence, it is difficult for anyone to suggest that Paul Cranswick even testified on the matter of admission or acknowledgment to start with.
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> [73] Since the record shows that the matter of acknowledgment under ss 26 and 27 of the Limitation Act 1953 only came up at the time of submissions, there is room to argue that the application falls within the ground complained of, especially that the jurisdiction of the learned arbitrator did not include or involve him dealing with the alternative ground or plea of acknowledgment. When the learned arbitrator did so, he was certainly in excess of jurisdiction of the matters in dispute and referred to him for determination. There is a new difference between the dispute referred and the dispute that he was finally determining.
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> [74] In the present context, the acknowledgment has to be by Ssangyong to Tridant; or by and to the respective agents of the parties. A third party may include an agent; but it certainly cannot include or mean a stranger which is who T & T or its liquidator is in relation to the present parties. That person or third party to whom

Ssangyong filed the POD is not an agent of Tridant and can never be so construed even in the wildest and most liberal sense.

[75] All these principles were not understood or properly appreciated by the learned arbitrator before he proceeded to apply and determine the issues. Although the sum stipulated in the POD may include Tridant's claim and while Ssangyong's witness may have agreed that Tridant's claim is included in Ssangyong's claim with Yetcome, that is a long way from being an acknowledgment within the operation of ss 26 and 27 such as to give a fresh lease or right of action. I am aware that the court does not intervene in matters concerning findings of fact by the learned arbitrator. But there is no finding here since no questions on acknowledgment within the meaning of ss 26 and 27 were even asked because the issue was not available at the time of evidence gathering.

[76] What the learned arbitrator did in this case was to treat the matters identified as amounting to acknowledgment. With respect, the learned arbitrator cannot do that and he is not entitled to do so to begin with. He has got the principles of law under ss 26 and 27 of the Limitation Act 1953 wrong for all the reasons already discussed. His interpretation and construction of these provisions are not only erroneous but not countenanced in law. In fact, by doing so the learned arbitrator has exceeded his jurisdiction. Such decision has substantially affected the interests of Ssangyong in the sense as described, from a claim which should remain dismissed as was already decided by the learned arbitrator to one which was allowed. Such a decision is clearly wrong and must be set aside.

OUR GROUNDS OF DECISION

[14] From the submissions of respective counsel and the manner in which the learned judge decided the dispute before her, we were of the view that there were two issues requiring deliberation and decision and they were as follows:

(a) whether the learned judge was correct in finding that the learned arbitrator had decided on a matter (postponement of the limitation period of the debt claimed) outside his term of reference resulting in an exercise in excess of his jurisdiction?

(b) whether the learned judge was correct in finding that the learned arbitrator had erred in finding that the proof of debt lodged by the respondent had postponed the limitation period of the debt claimed pursuant to ss 26 and 27 of the Limitation Act?

Issue 1

Whether the learned judge was correct in finding that the learned arbitrator had decided on a matter (postponement of the limitation period of the debt claimed) outside his term of reference resulting in an exercise in excess of his jurisdiction?

[15] This issue relates to the application of s 37 of the Arbitration Act 2005. The respondent had relied on ss 37(1)(a)(iv), 37(1)(a)(v), 37(1)(b)(ii) and

A 37(2)(b) which respectively say as follows:

37(1) An award may be set aside by the High Court only if:

(a) the party making the application provides proof that —

(i) ...

B

(ii) ...

(iii) ...

(iv) *the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;*

C

(v) *subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;* or

(vi) ... or

D

(b) the High Court finds that —

(i) ... ; or

(ii) *the award is in conflict with the public policy of Malaysia.*

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in E conflict with the public policy of Malaysia where —

(a) ... ; or

(b) *a breach of the rules of natural justice occurred —*

(i) *during the arbitral proceedings; or*

F

(ii) *in connection with the making of the award.*

[16] To recapitulate, the learned judge had found that the learned arbitrator had exceeded his jurisdiction when he had considered and decided an issue G which had not been pleaded by the appellant. It was not disputed by the appellant that the plea of postponement of the limitation period was not pleaded and was only brought in during submission stage.

[17] At this juncture, we should and now do mention the factual matrix H upon which the learned arbitrator relied on in deciding that there was a postponement of the limitation period in respect of the appellant's claim. The respondent had presented a winding up petition against the employer, which led to a winding up order dated 4 June 2003 being made against the same. However, it was later discovered by the respondent that the owner of the project I site was actually a different legal entity known as Yetcome Investments Ltd. This resulted in another winding up petition being presented against Yetcome Investments Ltd but later was not proceeded with after it was found that the assets of Yetcome Investments Ltd belonged to a company known as T&T Properties Sdn Bhd which in turn owned the buildings of the project site, ie the

car park, shopping mall, the office tower and the hotel. On 23 February 2009, T&T Properties Sdn Bhd was wound up by Alliance Merchant Bank Bhd. The respondent then filed their proof of debt which totalled RM22,419,538.28 dated 25 March 2009 with the official receiver of T&T Properties Sdn Bhd.

[18] From the evidence of one Paul Adrian Cranswick, who was the respondent's witness, it was established that aforesaid proof of debt included the respondent's claim and the claim of all its nominated subcontractors, including the appellant. This was acknowledged by the learned judge at para 66 of her grounds where she alluded to the admission by Paul Adrian Cranswick when questioned during cross-examination of him.

[19] The learned arbitrator then used the admission of Paul Adrian Cranswick as an acknowledgment of the debt bringing into play ss 26(2) and 27 of the Limitation Act 1953 which respectively reads as follows:

> 26(2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.
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> 27 Formal provisions as to acknowledgments and part payments
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> (1) Every such acknowledgment as is referred to in section 26 or in the proviso to section 16 of this Act shall be in writing and signed by the person making the acknowledgment.
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> (2) Any such acknowledgment or payment as is referred to in section 26 or the proviso to section 16 of this Act may be made by the agent of the person by whom it is required to be made under that section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

[20] Though the above sections were not pleaded, the learned arbitrator allowed respective counsel to fully submit on this issue. This can be seen from paras 146–147 of the award.

[21] Arising from this, it was found by the learned judge that there was no breach of the rules of natural justice on the part of the learned arbitrator. There was also no evidence that the respondent had protested against the arbitrator's introduction of this issue of postponement of the limitation period for the appellant's claim. Neither was there any request by the respondent that an adjournment be granted for it to call any rebutting evidence.

[22] In our deliberation on this issue, we took note of the fact that Arbitration Act 2005 was enacted to keep Malaysia in sync with other common law jurisdictions which had adopted the model law principles as the basis of their arbitral regime. It can be said that the model law brought with it the philosophy of party autonomy, minimal court intervention and enhanced power to the arbitral tribunal. This is a departure from the philosophy prevalent in the arbitral regime prior to the Arbitration Act 2005, where the courts took a more active role in intervening into arbitral awards (see *The Arbitration Act 2005 — UNCITRAL Model Law as applied in Malaysia* — Sundra Rajoo and WSW Davidson).

[23] The modern approach and the philosophy behind the same are succinctly spelt out in *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR 732 where the Singapore Court of Appeal said:

> Judicial policy towards arbitration
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> 28 There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind us. An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with. More fundamentally, the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration. In essence, a court ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law.
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> 29 There are myriad reasons why parties may choose to resolve disputes by arbitration rather than litigation. The learned authors of *Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (Sweet & Maxwell, 4th Ed, 2004)* ('Redfern and Hunter') offer two principal reasons: first, the opportunity to choose a 'neutral' forum and a 'neutral' tribunal (since parties to an international commercial contract often come from different countries); and second, international enforceability of arbitral awards under treaties such as the New York Convention. Under these treaties, an arbitral award, once made, is immediately enforceable both nationally and internationally in all treaty states. One would imagine that parties might be equally motivated to choose arbitration by other crucial considerations such as confidentiality, procedural flexibility and the choice of arbitrators with particular technical or legal expertise better suited to grasp the intricacies of the particular dispute or the choice of law. Another crucial factor that cannot be overlooked is the finality of the arbitral process. Arbitration is not viewed by commercial persons as simply the first step on a tiresome ladder of appeals. It is meant to be the first and only step. Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration. It must also be remembered that the whole thrust of the International

Arbitration Act is geared towards minimising court involvement in matters that the parties have agreed to submit to arbitration. Concurrent arbitration and court proceedings are to be avoided unless it is for the purpose of lending curial assistance to the arbitral process. Jurisdictional challenges must be dealt with promptly and firmly. If the courts are seen to be ready to entertain frivolous jurisdictional challenges or exert a supervisory role over arbitration proceedings, this might encourage parties to stall arbitration proceedings. This would, in turn, slow down arbitrations and increase costs all round. In short, the role of the court is now to support, and not to displace, the arbitral process.

[24] In the New Zealand jurisdiction, a similar philosophy of minimal court intervention also prevails. Bingham J (as he then was) in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 said:

... As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with meticulous legal eye, endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault can be found with it.

[25] In our jurisdiction, the court's intervention is provided for in s 8 of the Arbitration Act 2005 which says:

8 Extent of court intervention

No court shall intervene in matters governed by this Act except where so provided in this Act.

[26] In *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126; [2015] 1 CLJ 617 where this court said as follows:

[10] Underlying these detailed legal arguments is the important issue of the extent to which courts should interfere with an arbitration award in the context of the Act which has made it clear in s 8 (as amended) that no court shall intervene in matters governed by the Act 'except where so provided in the Act'. The policy to be adopted by our courts is that of minimal intervention consistent with the policy underlying the UNCITRAL Model Law, which Malaysia has incorporated with suitable amendments. Section 37 mirrors the Model Law (Article 34). However, s 42 has no direct equivalent provision in the Model Law. Nevertheless, this court has to carefully consider whether we should strictly construe and adhere to the principles of party autonomy, finality of arbitration awards and minimal court intervention rigidly on the facts of this appeal, even though in the context of a domestic arbitration

[27] This court also in the case of *SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627; [2014] 3 CLJ 632 expressed similar views as follows:

A [48] Judicial intervention under the old regime pursuant to Arbitration Act 1952 was quite common and threshold to satisfy was much low, as reflected in a number of case laws. The courts took the position that arbitrators must strictly fulfil the requirement of strict judicial and adjudicating process and any omission, misconduct or breach, etc, will entail judicial intervention. The more recent cases B before AA 2005 came into force will demonstrate that courts have already taken cognisance of UNCITRAL model law which advocates minimum intervention and in consequence had increased the threshold for intervention. The court had ruled that the final award of the arbitrator must be viewed in its totality and, any error of law on the face of the award must be one that is patent and obvious as to render the C award manifestly unlawful and unconscionable to subsist and, thereby justify it to be set aside. (See *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791.)

[28] Our Federal Court have also expressed their view in *The Government of* D *India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441; [2012] 3 CLJ 423 where Richard Malanjum CJ (Sabah and Sarawak) said:

[52] We note that the Arbitrators were faced with a question on the construction of a clause in an agreement. From the reading of it, no doubt it could be given two interpretations — one in favour of the appellant and one in favour of the E respondents. For that very reason, the matter was sent for arbitration. The fact that the learned Majority Arbitrators took one approach in interpretation (which was in favour of the respondents) over the other cannot be a ground for challenge.

[53] And as Scrutton LJ put it '... if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an F arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment'. (See *African and Eastern (Malaya) Ltd v White, Palmer and Co Ltd* [1930] 36 Lloyd's L R 113; cited with approval by the Court of Appeal in *Dato' Teong Teck Kim v Dato' Teong Teck Leng* [1996] 2 CLJ 249.)

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[29] Reverting to the issue at hand, that is the non-pleading of ss 26 and 27 of the Limitation Act, we must not lose sight of the fact that arbitral proceeding is not a court proceeding where there is in existence a specific legal procedural H regime regulating its process. Arbitration is an alternative dispute resolution module where disputes are resolved by legally as well non-legally trained adjudicators. Hence arbitration is conducted with greater flexibility and freedom from the rigid procedures of litigation in the judicial system. It is trite that the Evidence Act 1950 is not applicable to arbitral proceeding and rightly I so.

[30] Further, in any arbitral proceeding, the primary concern is to ensure that the rules of natural justice are complied with. This much is made clear in s 20 of the Arbitration Act 2005 which says that the parties shall be treated with

equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.

[31] Having what have been said in preceding paragraphs uppermost in our minds, we took an approach that the appellant's failure to plead ss 26 and 27 of the Limitation Act 1953 was not fatal to its claim as the respondent was given every opportunity to submit on that issue. There was also no evidence to say that the respondent had suffered a disadvantage or deprived of an opportunity to ventilate that issue. In fact, the learned judge had found that the rules of natural justice had not been breached on this issue except she found that 'there is a new difference between the dispute referred and the dispute that he was finally determining'.

[32] In any event, we also said that even though ss 26 and 27 of the Limitation Act 1953 were not formally pleaded, the pleadings as they stood were adequate to put the respondent on notice the issue of postponement of the limitation period. It was undisputed that the defence of the respondent in the alternative was that the appellant's claim was time barred by virtue of the Limitation Act and once that issue of limitation was put on the table so to speak, the appellant was fully entitled to avail of any means to rebut the defence of limitation. That was what the appellant did when its counsel was able to elicit, through cross-examination of Paul Adrian Cranswick, evidence of the proof of debt lodged which was successfully contended by the appellant before the learned arbitrator. Hence we were of the view that the respondent's complaint of not having pleaded the aforesaid sections of the Limitation Act was misconceived.

[33] We also found support for our view from the case *PT Prima International Development v Kempinski Hotels SA* [2012] SGCA 35 where the Singapore court was confronted with a similar contention as in our case that an arbitral award ought to be set aside when the arbitrator had decided on issues not formally pleaded. The appellant, Prima, which owned a hotel in Indonesia had entered into a management agreement with the respondent, Kempinski. Prima terminated the management agreement premised on Kempinski's failure to carry out its obligations under the management agreement. Kempinski disputed the validity of the termination and took the dispute to arbitration in Singapore which it lost resulting in three arbitral awards made against it. Kempinski then took out an application in the High Court to set aside the aforesaid awards on the ground that the same were made on issues (the effect of the new contract) that had not been pleaded formally and thus outside the term of reference or jurisdiction of the arbitrator. Kempinski succeeded in the High Court resulting an appeal to the Court of Appeal.

[34] The Court of Appeal of Singapore allowed the appeal of Prima and in view of the instructive nature of what was stated by them we find it apt to quote in extenso the manner our counterpart dealt with the issue:

> 47. ... In our view, any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded. It may be raised in the arbitration, as Prima did when it raised the New Management Contract as part of its force majeure defence to Kempinski's claim. We should also point out that Kempinski was given sufficient notice of and opportunity to meet Prima's force majeure defence.
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> 48. In our view, the Judge, with respect, took too narrow an approach in determining the extent or scope of the Arbitrator's jurisdiction under the parties' submission to jurisdiction. She erred in finding that since the New Management Contract had not been pleaded, its legal effect on Kempinski's claim in the Arbitration was not within the scope of the parties' submission to arbitration. We take the different view that since Kempinski was seeking either damages from 6 February 2002 onwards 'for the remainder of the term of the (Management) Contract' (ie, until 15 April 2014) or, alternatively, specific performance of the Management Contract, any new fact or change in the law arising in the course of the Arbitration which would affect Kempinski's right to these remedies must fall within the scope of the parties' submission to arbitration. In the circumstances, it was well within the Arbitrator's jurisdiction to decide whether, in the event that Kempinski succeeded against Prima on the issue of liability, the New Management Contract had the legal effect contended for by Prima. The matter can be considered from another perspective. Suppose we were to agree with the Judge and dismiss Prima's appeal in CA 95 on the ground that Prima should have (as the Judge held) amended its pleadings to specifically plead the New Management Contract and its legal effect, the final outcome of Kempinski's claim in respect of the period after 28 April 2006 (after this matter is remitted for arbitration) would still be the same. Prima would still be entitled, after making the necessary amendments to its pleadings, to adduce evidence of the New Management Contract to show that Kempinski would not be entitled to any damages or to insist on specific performance of the Management Contract after 28 April 2006.
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> 49. Our conclusion on the pleadings argument provides a different perspective as to whether it was necessary for Prima to further amend its Points of Re-Amended Defence and Counterclaim to plead the defence arising out of the New Management Contract. The Judge held that Prima's failure to do so resulted in the legal effect of the New Management Contract being outside the scope of the parties' submission to arbitration, and was therefore fatal to the Third Award. However, leaving aside this conclusion (which, with respect, we have held to be an error of law), the crucial question is whether Kempinski was prejudiced by Prima's omission to amend its pleadings to plead the New Management Contract and its legal effect. The Judge held that Kempinski was prejudiced in that if that issue had been formally pleaded, Kempinski would have been able to reply to Prima's pleadings on that issue. The Arbitrator would then have been able to (see [61] of the Judgment):
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> ... take evidence on the (N)ew (M)anagement (Contract) and ... establish the facts necessary to come to a decision as to whether or not the existence of the (N)ew

(M)anagement (Contract) made it impossible for (Kempinski) to perform the (Management) Contract and/or claim damages.

50. With respect, we disagree with the Judge's views on this issue.

[35] The principle distilled from the above is simply this. As long as there has not been any breach of the rules of natural justice and parties had been given ample opportunity to submit on the issue which was ancillary to the claim or defence, the strict rule of pleadings does not apply in the arbitral regime. In our present case, the reliance of ss 26 and 27 of the Limitation Act was a matter ancillary to the alternative defence of the respondent.

[36] Justice Hamid Sultan Abu Backer in *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporation Sdn Bhd* [2009] MLJU 0793; [2010] 5 CLJ 83 relied on the definition of arbitration agreement set out in s 9 of the Arbitration Act 2005 to opine that that section 'will also go to show Parliament has in its wisdom given wide powers to arbitrator to bring to an end all issues whether pleaded or not as long as it is relevant and arises in consequence of the arbitration agreement to reach its finality'.

Section 9 of the Arbitration Act 2005 defines 'arbitration agreement' to mean 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'.

[37] It now appears that even in the courts, we have taken a more liberal approach about the strict rule of pleadings. In the recent case of *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719, the Federal Court, with a quorum of five, had this to say:

> [89] It is trite law that the parties are bound by their pleadings and the trial of a suit must confine to the pleadings. The court is not entitled to decide a suit on a matter that has not been pleaded.
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> [90] However, in some instances, evidence adduced during the hearing can overcome the defects in pleadings as long as the other party is not taken by surprise. More so if 'Such evidence when given without any objection by the opposing party will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading.

[38] For reasons stated above, we, with respect, said that the learned arbitrator was perfectly within his right to determine the issue of postponement of limitation period which was closely connected to the defence of limitation.

Issue 2

Whether the learned judge was correct in finding that the learned arbitrator was had erred in finding that the proof of debt lodged by the respondent had postponed the limitation period of the debt claimed pursuant to ss 26 and 27 of the Limitation Act?

[39] Our starting point must be s 42 of the Arbitration Act 2005, the relevant parts of which state as follows:

> (1) Any party may refer to the High Court any question of law arising out of an award.
>
> (1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

[40] What s 42 entails is succinctly set out by Mohamad Ariff Yusof JCA (as His Lordship then was) in *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126 at pp 145–146; [2015] 1 CLJ 617 at pp 636–637 as follows:

(a) the question of law must be identified with sufficient precision;

(b) the grounds in support must also be stated on the same basis;

(c) the question of law must arise from the award, not the arbitration proceeding generally;

(d) the party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights;

(e) the question of law must be a legitimate question of law, and not a question of fact 'dressed up' as a question of law;

(f) the court must dismiss the reference if a determination of the question of law will not have a substantial effect on the rights of parties;

(g) this jurisdiction under s 42 is not to be lightly exercised, and should be exercised only in clear and exceptional cases (*Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 5 MLJ 98; [2013] 8 CLJ 655);

(h) nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable;

(i) the arbitral tribunal remains the sole determiners of questions of fact and evidence; and

(j) while the findings of facts and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse.

[41] The circumstance leading to the question framed was, in our view, simply the arbitrator's discharging his duty as asked of him in giving a construction to provisions of law (ss 26 and 27 of the Limitation Act) premised on a set of undisputed facts. In more specific terms, the learned arbitrator found that the proof of debt lodged by the respondent amounted to an acknowledgement of a debt which had postponed the limitation period as provided for under ss 26 and 27 of the Limitation Act. Of course the learned arbitrator was faced with two interpretations of law and fact which we did not find them perverse and we say that for the simple reason that even we held different views among ourselves as to which interpretation should prevail. It must not be forgotten that the arbitration was convened for the simple reason to resolve the competing interpretations by their chosen arbitrator. That being the case, it would be farcical for the court to intervene when in the first place the parties had agreed to abide by the referee's decision.

[42] Further, in our view, the manner in which the question of law was framed was nothing more than a mixed question of law and fact 'dressed up' in a question of law. It is trite that the court has no jurisdiction to a mixed question of fact and law.

[43] As shown earlier, the modern approach of the courts towards arbitral award dictates that unless the award is clearly and obviously tainted with some sort of illegality such that it would not be conscionable for the courts to allow the same to stand, there will not be any intervention. This approach is nothing more and nothing less than giving effect to the very bargain which the parties had agreed to. We must not lose sight of the fact that when parties resort to arbitration to resolve a dispute, they are in fact choosing an expert in the area of dispute to give a final and binding 'referee's decision'. To allow the losing party to now question the expert's findings would destroy the very foundation of an arbitration agreement. Further the courts do not sit in an appellate function when hearing references from arbitral proceeding. Their function is only one of very limited supervisory nature.

[44] For reasons stated above, we found the question of law as framed by the respondent before the learned judge was flawed and should not have been allowed by the learned judge. That being the case, we found it unnecessary to answer the question as whether the learned arbitrator's interpretation of the law and fact was correct in law.

CONCLUSION

[45] Our decision was nothing but an affirmation of the modern approach by the courts towards the arbitral regime. When parties have seen it fit to agree that their disputes be resolved by an arbitral process rather than the judicial

process, the courts must first and foremost respect and enforce such choice for the simple reason that they had exercised their right of freedom of choice.

[46] It must also not be forgotten that arbitral awards once registered with the courts are elevated to the status of a judgment from the courts with all the benefits of execution provided by law. The fact that the Arbitration Act 2005, among others, now give an arbitrator the right to determine his or her jurisdiction and give interim measures, it can be said that an arbitral tribunal has practically all the trappings of a judicial body. Hence by inference, Parliament has in their wisdom deemed it fit to allow disputing parties in the commercial world to settle their disputes outside the judicial process and that has to be respected.

[47] Premised on the above, we allowed the appeal with costs in the sum of RM50,000 for here and below subject to payment of allocatur fees. We also set aside the orders of the learned judge, reinstated the award of the learned arbitrator and granted prayer (a) in Originating Summons 24C (ARB)-24–06 of 2015. We also ordered that the deposit to be refunded to the appellant.

Appeal allowed with costs of RM50,000.

Reported by Afiq Mohamad